

How to make the Brexit deal formal, legally-binding and irreversible

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Whatever one thinks ([and one does](#)) about the British renegotiation of its terms of EU membership, one can only marvel at the prime minister's bravado when he insists on the changes being 'formal, legally-binding and irreversible'. Nobody expected David Cameron to be so categorical when he embarked on his long-anticipated speech and 'Dear Donald' letter, eventually delivered on 10 November. Surely somebody warned him that to demand something so trenchant would pose huge legal problems?

Everyone now knows, including the prime minister, that treaty change is impossible to deliver before the British referendum. So how can Cameron's concrete demand for a 'formal, legally-binding and irreversible' British exemption from Article 1 TEU ('ever closer union') be met? Other demands of his – notably giving more veto powers to national parliaments, changing the legislative procedure for the benefit of non-euro states or giving the UK an opt-out from the Charter of Fundamental Rights – will also entail treaty revision, but as the need to break away from the EU's historic mission seems to be his most important demand, let us stick to that.

Whatever it contains, Cameron's renegotiated package has to look better than it really is. He knows he faces a scornful reception in the House of Commons and much of the British media. Any empty boasting about a 'formal, legally-binding and irreversible' triumph will only stoke the No vote. Cameron's Brexit deal is also likely to be dispatched to the European Court of Justice for a preliminary ruling under Article 267 TFEU on whether it falls foul of the UK's treaty obligations: so it had better be good.

The prime minister says he is looking for arrangements of the type granted to Denmark on the Treaty of Nice in 2002 and to Ireland on the Treaty of Lisbon in 2009. He will shortly discover that those examples are not real precedents for Brexit, for two reasons. First, because the Brits are seeking actually to change the Lisbon treaty that they have signed and ratified, and is already in force, while the Danes and Irish were trying only to ratify treaties they had signed in order to bring them into force. In other words, whereas Denmark and Ireland were trying to honour their treaty commitments in spite of referendum slip-ups, the UK is promoting a referendum expressly in order to breach its treaty commitment. As [Jean-Claude Piris](#) has confirmed, no new opt-outs were conceded to the Danes or Irish. Quite frankly, a promissory note issued by the European Council to allow the UK in future to breach the treaties is unlikely to go down well in the EU's family of constitutional courts.

But there is another argument as to why a formal promise of the European Council to change the treaty in the future – even if put into a Council decision and tabled at the UN – can never be 'legally-binding and irreversible'. This is because the Lisbon treaty, now in force for six years, has changed the constitutive procedures of the EU by adding in the wild card of the Convention (Article 48(3) TEU). The Convention is made up of the European Council, the Commission, the European Parliament and national parliaments. Its job is to propose amendments of the treaties to an intergovernmental conference. So while the member states can still lay claim to being the ultimate 'masters of the treaties', their prerogative is not unqualified: they cannot change the treaty, or even promise to change the treaty, left to their own devices. And it's the European Parliament, not the European Council which gets to decide on whether to call a Convention.

If the heads of government want to placate Cameron, therefore, they can promise formally to change the treaty in the future, but such a promise will be neither legally-binding nor irreversible (as prime ministers come and go every other day). The European Council cannot guarantee an explicit treaty amendment without the agreement of the European Parliament not to insist on the calling of a Convention. Parliament can only agree not to call a Convention 'should this not be justified by the extent of the proposed amendments'. There is no way that the UK's intended breach of its membership obligations does not justify a Convention several times over. MEPs will never lay themselves open to legal challenge and political ridicule by surrendering their prerogatives over such major constitutional disruption.

So if the European Council is minded to make a binding promise to the British it will have to charge the European Commission to initiate a proposed revision of the treaties under Article 48(2) if and when the UK has voted to remain in the EU. The President of the Commission, being a member of the European Council, can indeed be bound by a decision of the European Council. He is the only one who can instrumentalise the collective promise of the European Council. According to Article 48(2) it is only the Commission, the Parliament or a member state government (and not the European Council) who can submit to the Council proposals for the amendment of the treaties.

Any Brexit agreement, therefore, should command the President of the Commission to trigger the Article 48(2) process if (and only if) the British in their referendum have said Yes to staying in the Union. A strict timetable should be laid down for this to happen – say, within one year of the referendum.

Such a pragmatic formula would likely to be accepted by the Court of Justice as a reasonable fix in the circumstances, being as near as possible to legally-binding without actually having changed the treaties. It should also be enough to give Cameron the chance to persuade most Brits to stay in the Union. Jean-Claude Juncker should be happy to oblige.

And the European Parliament should welcome the breaking of a deadlock on treaty change. MEPs are already preparing their own dossier for constitutional amendments to rival those of the UK under the rapporteurship of the redoubtable Guy Verhofstadt. On 11 November Parliament voted to introduce transnational lists for a pan-EU constituency, a change in electoral procedure that requires a revision of primary law. It will shortly have more bright ideas. And faced with the pressing need to deepen its fiscal integration, the eurozone cannot be far behind with its own proposals for treaty change. Let a thousand flowers bloom, binding and irreversible.

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